SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 135

SAMUEL CAMARATO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable the Supreme Court of the United States:

Petitioner prays for the issuance of a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Third Circuit, entered herein April 9, 1940 (R. 142), rehearing denied May 11, 1940 (R. 154).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

Statute Involved.

The proceedings were based upon Title 28, U. S. C., Section 385, which is as follows:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or

imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree, or command of the said sourt."

Decision of Court Below.

The opinion of the Court below is contained in the record at page 134 and is reported in 111 F. (2d) 243.

Statement of Facts.

Petitioner was held in contempt (R. 76) by the United States District Court for the District of New Jersey (Judge Fake) for refusing to answer, on the ground that they would incriminate him, the following questions propounded to him before the Federal Grand Jury then sitting in that District (R. 109):

(a) "Q. What is the name of your place of Business?"

(b) "Q. Did you at one time sell wire service to horse rooms?"

(c) "Q. In 1931, did you have any connection with wire service?

A. 1931, no.

Q. In 1932?"

(d) "Q. You answered it for 1931. What is the objection to answering it for 1932 since you have answered it for 1931?"

(e) "Q. Did you have any connection with wire service in 1933?"

(f) "Q. Did you have any connection with wire service at any time?"

(g) "Q. You get wire service in your horse room, don't you?"

(h) "Q. You never paid for wire service in your horse room, did you?"

(i) "Q. How long have you had a horse room in Atlantic City?"

(j) "Q. What kind of work did Joe Camarato do?"

(k) "Q. Didn't you have a switchboard in Atlantic City through which you delivered wire information to horse rooms?"

(l) "Q. Well, did you at any time supply wire information or any racing information over the wire to any horse rooms in Atlantic City?"

(m) "Q. In 1935 when you met Goodman what business did you have with him?

A. I didn't have no business at all with Goodman.

Q. Did you ever speak to him?

A. Yes, I spoke to him.

Q. Wasn't it business talk that you had with him?"

(n) "Q. Did you have any conversation with Goodman about getting your wire information free in your own horse room?"

Petitioner, a bookmaker and gambler, was given the opportunity of purging the contempt by answering the questions, but on advice of counsel refused to do so. Thereupon he was sentenced to six months' in jail (R. 88). On appeal the conviction was affirmed April 9, 1940 (R. 142); opinion (R. 134). A petition for rehearing was denied May 11, 1940 (R. 154).

The background of petitioner's refusal to answer the questions propounded was as follows: For some time the United States Government had been engaged in an intensive "drive" against politicians, gamblers and so-called "racketeers" in Atlantic City, New Jersey. This "drive" had taken the usual form of income tax indictments. These facts are within the judicial notice of this Court as several of these cases have been before it. *Clark* v. *U. S.*, No. 684, October Term, 1939 (certiorari denied March 4, 1940). *Rubenstein* v. *U. S.*, cert. den., October Term, 1939, No. 697.

As an indication that the Government was primarily engaged in investigating alleged income tax violations by gamblers and racketeers, there was submitted in evidence (R. 112, 114) at the hearing below an indictment for perjury of Joseph Camarato, nephew of petitioner, containing the following statement:

> "That then and there and theretofore there was exhibited to and given in charge to inquire by the said grand jury the questions of what persons, if any, were engaged in the conducting of houses of prostitution, the making of books on races and accepting of bets on horse races from the public as a business, the engaging in the numbers or policy business and the accepting of moneys for shares in winning numbers thereof to be determined by chance and the conducting of other illegal enterprises and businesses at and in the City of Atlantic City, in the County of Atlantic and the said State and District; what income was received by the proprietors of the said enterprises and businesses and the expenses incurred by each and to whom paid; the names of the persons to whom said proprietors had paid moneys for any purpose whatever; *whether the proprietors of the said enterprises and businesses and persons to whom they had paid moneys had filed false and fraudulent individual income tax returns or had filed no individual income tax returns with intent to defraud the United States, or had paid income taxes for less than was due the United States, or had paid no income tax whatever when income tax was due the United States fo rall or any part of the years 1930 to 1938, both inclusive, with the view that the said Grand Jury might in all cases, disclosed to them by the evidence, find and return true bills of indictments for violations of income tax laws of the United States* proven by the testimony to have been committed in the said City of Atlantic City, as to them seemed necessary and proper;"

The same statements are contained in the indictment for perjury of Frank Molinaro, likewise submitted in evidence

below (R. 122, 124). Petitioner's name is prominently mentioned as a book maker in both of these indictments (R. 119, 120; 126, 127). The Government said: (R. 87).

> "We believe that he (Petitioner) either directly or indirectly controls the gambling enterprises of Atlantic City."

The trial court said:

> "There is no question that it is as I have said and as you have said, as we have all agreed: the Grand Jury is engaged in an investigation as to violations of the income tax law. There is no question about that (R. 49)."

The Grand Jury immediately prior to appellant's appearance as a witness was particularly concerned with the operation of a horse room by William Kanowitz and David Fischer during the years 1935, 1936, and 1937, and especially what they paid for the receipt of prompt track information and racing results, what amounts they paid for this and the manner and to whom paid (R. 116). They also were inquiring whether *Joseph Camarato,* petitioner's nephew, visited Kanowitz and Fischer's place of business during the aforementioned years and at what times and for what purposes, whether he collected "any moneys for so-called 'lay-off' bets or other moneys for himself or one *Sam Camarato,* (petitioner) or any other person;" whether he collected from Kanowitz and Fischer or any other person "any envelopes or moneys for any purpose or for any person;" whether he visited Kanowitz and Fischer's place of business every week "and made collections for them, for himself or for any other person and if so in what amounts and for what person and purpose"; *and whether the moneys so collected were reported in the income tax returns of the person receiving the same* (R. 117, 118). Turning to the

Molinaro indictment we find that the grand jury was also inquiring whether Molinaro "had or had not the job or employment of going to book making and horse race betting establishments in Atlantic City aforesaid to make collections of sums due to or exacted by the said *Sam* Camarato;" (petitioner) whether Molinaro visited Kanowitz and Fischer's place "and collected any envelope at any time and had given same to the said *Sam Camarato* or to any other person for the said *Sam Camarato;*" and whether he had collected moneys from Kantowitz and Fischer and if so "in what amounts, for whom and for what purpose; * * *" (R. 126, 127).

In addition to the indictments, appellant introduced in evidence the testimony of David Fischer (mentioned in the foregoing indictments) given by him in the contempt proceedings brought before Judge Fake against Joseph Camarato and Molinaro. The full transcript was not available (R. 37) and it was agreed that the statement of counsel accurately set forth the substance (R. 39). Fischer had testified that he and his partner Kanowitz had wire service in their horse room, that is, received information by telephone on the running of races, that on a particular day in each week he paid to Joseph Camarato $200.00 a week, $40.00 of which was for wire service and $160.00 for a purpose which was not disclosed. It appeared from his testimony that whoever collected $40.00 a week for wire service also collected, in addition, the sum of $160.00 weekly (R. 38). Fischer had given similar testimony before the grand jury on August 22, 1939.

The examination of petitioner before the Grand Jury appears in the record (R. 89-99), from which it will be observed that petitioner did not refuse to answer *all* questions: he claimed his privilege only as to the questions enumerated above. Petitioner stated he knew from news-

paper accounts and common talk that he was being investigated (R. 92). It will be observed from petitioner's examination before the Grand Jury that the United States Attorney was attempting to ascertain the nature of petitioner's business and also his connections with Enoch L. Johnson (R. 90, 91).

As already indicated, the trial court held that petitioner was not privileged to refuse to answer the questions on the ground of the privilege against self incrimination. It is probable that the court reached this conclusion on its own theory (as it announced) that if petitioner answered the questions and if he was indicted, he could then move to quash the indictment on the ground that he had been compelled to testify against himself; that is, if in testifying he thought he was testifying about a case that did not involve himself (R. 71). The Government frequently assured the court that so far as petitioner's "information service" was concerned, the Government's questions were not directed toward determining what his income was (R. 57) and that the investigation was not directed toward the indictment of the petitioner (R. 65, 70, 71, 88).

A second question is also involved in the present case: Whether Due Process was observed below. The presentment alone (R. 2) fails to disclose whether the alleged contempt was civil or criminal and likewise fails to contain a prayer to adjudge petitioner in contempt. No process was issued in the form of any rule to show cause or otherwise. These defects were brought promptly to the attention of the court at the hearing (R. 5, 6).

Questions Presented.

1. Whether petitioner has been deprived of his Constitutional privilege against self incrimination by the rulings below.

2. Whether Due Process under the Fifth Amendment has been observed in the prosecution of the alleged contempt herein.

Reasons for Allowance of the Writ.

1. The decision of the court below is in conflict with the decisions of other circuit courts of appeals, particularly the case of *Zwillman* v. *United States* (C. C. A. 2nd), 108 F. (2d) 802, and *Weisman* v. *United States* (C. C. A. 2nd), 111 F. (2nd) 260.

2. The decision below is inconsistent with the following decisions of this Court:

Counselman v. *Hitchcock*, 142 U. S. 547;
Mason v. *U. S.*, 244 U. S., 362;
Arndstein v. *McCarthy*, 254 U. S. 71.

3. The general uncertainty of the law as to the privilege against self incrimination is indicated by the Government's brief below where, after stating that there is no difference of opinion that the Fifth Amendment applies to a witness before a Grand Jury and citing *Counselman* v. *Hitchcock*, 142 U. S. 547, the Government states:

> "There *is* a difference of opinion, however, in interpreting this basic principle and determining what answers may tend to incriminate a witness in any given case. There is also a difference of opinion as to just how far the Supreme Court intended to go in the Counselman *v.* Hitchcock case" (Government's brief below pages 9-10).

After analyzing *Counselman* v. *Hitchcock, supra,* the Government said:

> "Leaving the actual holding of *Counselman* v. *Hitchcock* and considering the language of the opinion, no definite guide for lower Courts can be found."

After citing the broad protective principle of *Counselman* v. *Hitchcock, supra,* applying the principle to obtaining "leads" the Government contrasts therewith *In re Willie*, 25 Fed. Cases No. 14692e, which seems to restrict the privilege to answers which would form a *necessary and essential* part of a crime which is punishable by the laws. The Government then cites *Mason* v. *U. S.*, 244 U. S. 362; *Brown* v. *Walker*, 161 U. S. 591, 600; *Ex Parte Irvine*, 74 Fed. 954, 960, and seems to admit that there is a substantial difference of opinion on the entire subject in the Federal courts. Apparently, the Government below argued that the privilege was restricted to questions that were *directly incriminating* (Government's brief below 15-17) citing *O'Connell* v. *U. S.*, 40 F. (2d) 201; and *U. S.* v. *Weinberg*, 65 F. (2d) 394. In the trial court the Government stated:

> "There have been so many cases since then that the Counselman case has, to all intents and purposes, except as to general principles, been overruled" (R. 59).

We do not believe that the *Counselman* case, which applies the privilege to obtaining "leads" as distinguished from testimony *directly incriminating* has in fact been overruled, but the Government's argument illustrates the conflict and uncertainty which now exists and which this Court will remove by granting Certiorari herein.

4. The court below in declaring the presentment and subsequent proceedings made herein to be sufficient did not adhere to the decision of this Court in *Cooke* v. *U. S.*, 267 U. S. 517; *Gompers* v. *Buck Stove*, 221 U. S. 418, 441, 446, 448, and *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 418, and denied to petitioner due process of law as to procedure under the Fifth Amendment.

ARGUMENT.

1. Petitioner rightfully claimed his privilege:

This case presents the frequent picture of compelling a witness to trade the absolute protection of the Constitutional privilege for something less than that protection. It seemed to be the belief of the Trial Judge that because the Government prosecutor stated that he was not attempting to indict the petitioner, that the petitioner, therefore, ran no risk in answering the questions. The assurances, however, of the Government prosecutor are meaningless, it being well known that the Grand Jury could do as it liked, not being subject to the prosecutor at all. *Hale* v. *Henkel*, 201 U. S. 43, 60-61-62, citing *Blaney* v. *State*, 74 Md. 153; see also *Foot* v. *Buchanan*, 113 Fed. 156, 161; *Kaplan* v. *United States*, 7 F. (2d) 594, 597. Similarly the Government prosecutor could give no valid protection against future grand juries or subsequent Government prosecutors.

Further, this ground of decision ignores the fact that the Fifth Amendment was designed to protect *witnesses*, not defendants alone. If petitioner had been the real defendant in the investigation no questions at all could have been asked him. *Post* v. *U. S.*, 161 U. S. 583, 587; *U. S.* v. *Price*, 163 Fed. 904, 906; *O'Connell* v. *U. S.*, 40 F. (2d) 201, 205.

The only other ground for the trial court's decision is his claim that as a matter of fact answers to the questions propounded would do no harm to petitioner. We believe the true rule to be that in cases of doubt the petitioner is the best judge. It is only when it affirmatively appears the petitioner could *not* be injured, that the court should be entitled to overrule the witness' privilege. No such clear case is presented herein. It certainly cannot be denied that when petitioner was called before the Grand Jury the Government was engaged in an extensive income tax drive

against gamblers and racketeers in Atlantic City. The Government prosecutor frankly said that the present petitioner was the *"key to the whole situation, and one of the most notorious racketeers of the State of New Jersey. We (the government) say that he either directly or indirectly controls the gambling enterprises of Atlantic City"* (R. 86, 87). Petitioner knew that other gamblers had been convicted of income tax violations and had read newspaper articles that he was being investigated (R. 92). What more reasonable than for him to suppose the Government was after him too?

Petitioner does not claim that he is the sole judge as to whether the answer to a question would tend to incriminate him. However, if the danger of incrimination is real and appreciable he cannot be compelled to answer. *Mason* v. *United States,* 244 U. S. 362; *Counselman* v. *Hitchcock,* 142 U. S. 547.

The Court's attention is respectfully invited to the fact that petitioner was subpoenaed to appear before the Grand Jury. The trial court stated that the Grand Jury was engaged in an investigation of violations of the income tax law (R. 49). The Joe Camarato and Molinaro indictments offered in evidence by petitioner clearly show that the Grand Jury was investigating:

(a) Persons accepting bets on horse races from the public as a business and other illegal enterprises in and around Atlantic City.

(b) *What income* was received by the proprietors of said enterprises.

(c) The expenses incurred by each and to whom paid.

(d) The names of the persons to whom the proprietors had paid moneys for any purpose whatsoever.

(e) Whether the proprietors of said enterprises had filed false and fraudulent income tax returns for all or any part of the years 1930 to 1938, both inclusive (R. 114, 123-124).

The indictments in several places specifically named petitioner as the likely recipient of moneys from horse room proprietors and that he had exacted moneys from the proprietors of such horse rooms in Atlantic City. The indictments were returned by the same Grand Jury before whom the petitioner appeared.

In addition to the indictments, petitioner introduced in evidence at the contempt proceedings the testimony of one David Fischer (R. 38) given by him in contempt proceedings brought before Judge Fake against Joseph Camarato and Molinaro. Fischer was also named in the indictments. Fischer had testified that he and his partner Kantowitz operated a horse room and had wire service; that is, received information by telephone on the running of races. That on a particular day in each week he paid to Joseph Camarato $200.00 per week, $40.00 of which was for wire service and $160.00 for a purpose which was not disclosed. It thus appeared from his testimony that whoever received $40.00 a week for wire service also collected, in addition, the sum of $160.00 weekly. If petitioner testified that he sold wire service to horse rooms, the Government would then have had evidence which, coupled with Fischer's testimony, would show that petitioner received not only $40.00 per week for the service but also $160.00 per week for an undisclosed purpose. Thus the Grand Jury would have had proof of petitioner's income as a result of which petitioner would have been in real and substantial danger of prosecution.

The trial court appreciated the danger to be real and substantial. On many occasions the court stated that if the witness was compelled to give testimony against himself over his objection, immunity would result to him. This is not the law. In the case of *Foot* v. *Buchanan,* 113 Fed. 156, 161 (C. C. Miss.) 1902, the court said:

> "It is set up in the answer filed by the district attorney that the petitioner, when carried before the Court upon his failure to answer questions before the grand jury, was assured by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States. The petitioner could not be required to waive his constitutional privilege upon such an assurance by the court. He has a right to stand upon his constitutional privilege, notwithstanding such assurance, and to remain silent whenever any question is asked, the answer to which may tend to criminate him." *Temple* v. *Com.*, 75 Va. 892. See also *Kaplan* v. *United States*, 7 F. (2d) 594.

There can be no immunity from prosecution given by a judge or a prosecutor. Otherwise there would be no need for the enactment of the various immunity statutes. See *Sherwin* v. *U. S.*, 268 U. S. 369, 69 L. Ed. 1001.

The court below announced that if there are reasonable grounds to apprehend that a direct answer to a question may place the witness in a real and substantial position of danger, he could claim the privilege and cited in support thereof *Wigmore on Evidence*, 2nd ed., sec. 2271, and cases there cited. With this statement of the law we have no quarrel, but the fact that the prosecutor maintained the petitioner dominated gambling enterprises and that the Grand Jury was investigating income tax violations seem clearly to point to the real purport of the questions propounded to the witness. The questions sought to determine whether he was engaged in horse racing activities. The next question would have related to his income. In fact it did attempt to ascertain his business with Goodman (R. 136). Could not his connection with Goodman lead to evidence of incriminating character against petitioner, such as was condemned in the *Zwillman* and *Weisman* cases, ***infra.***

2. The conflict of decisions in the Federal Circuit Courts of Appeals.

The decision of the court below is at variance with the decision rendered by the Second Circuit Court of Appeals in the case of *Zwillman* v. *United States* (C. C. A. 2nd), 108 F. (2d) 802, and *Weisman* v. *United States* (C. C. A. 2nd 1940, 111 F. (2d) 260).

The most recent expressions of the Circuit Courts of Appeal relative to the privilege against self incrimination, particularly in contempt proceedings, were announced by the Second Circuit. We believe both decisions to be in conflict with the opinion of the Third Circuit rendered in the instant case.

In the case of *Zwillman* v. *United States*, 108 F. (2d) 802 (C. C. A. 1940), Zwillman appeared before a grand jury pursuant to a subpœna requiring him to testify to all and everything which he might know in regard to violations of the Conspiracy Statute. He was asked, "We were your business associates in 1928, 1929, 1930, 1931 and 1932." He refused to answer on the grounds of self incrimination. A judgment of contempt followed and he was sentenced to six months' imprisonment. On appeal the case was reversed and the court held:

> "Proof of who were defendant's associates in business might tend to establish a conspiracy to violate the revenue laws by failing to pay taxes, to affix stamps or to make returns under the applicable statutes. * * * Evidence necessary to show that defendant was engaged in a conspiracy during the years from 1928 to 1932 might well be supplied by proof of the names of business associates engaged in violating the laws relating to the manufacture or sale of liquor. If a conspiracy was shown in those earlier years it would continue unless abandoned and the defendant would have to prove abandonment in order to take advantage of the

statute of limitatoins. *Hyde v. United States*, 225 U. S 347, 368-370, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; *United States v. Rollnick*, 2 Cir., 91 F. (2d) 911, 918; *Coates v. United States*, 9 Cir., 59 F. (2d) 173, 174. The defendant claims, and we think with fair reasons, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them—at least if he could show that he was likely to be endangered by answering. *United States v. Burr* (*In re Willie*), Fed. Cas. No. 14692e; *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110."

In the instant case the petitioner, who was alleged to be in direct control of gambling activities in Atlantic City, was asked about his connections with one Goodman and the wire information furnished to certain horse rooms. It is submitted that the answer to these questions would be of a far more incriminating character than the questions seeking the identity of business associates in the *Zwillman* case, and would have been much more of a link in a chain of incriminating testimony.

In the case of *Weisman* v. *United States* (C. C. A. 2nd, 1940, 111 F. (2d) 260), Weisman was convicted by a Federal District Court for refusing to answer questions as to the receipt by him of certain cables at a restaurant in New York City and whether he knew anyone who visited, lived in or stayed at Shanghai, China, at any time from 1934 to 1939. The court said:

"The two questions were on their face innocent, and it lay upon the defendant to show that answers to them might criminate him. *United States v. Burr* (In re Willie), Fed. Cas. 14,692 (t); *State v. Thaden*, 43 Minn. 253, 255; *Regina v. Boyes*, 1 B. & S. 311, 321; *Zwillman v. United States*, 108 Fed. (2d) 802 (C. C. A. 2) Whether he had the burden of proof upon that issue we need not decide, for we think in any case he proved

his excuse. Obviously a witness way not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available. All this has been long understood, but it is not so clear to what facts the privilege extends. Does it protect more than those which 'tend' to prove a crime? Does it also cover those which can only be clues to the discovery of other facts which in turn so 'tend'? The doctrine of *Counselman v. Hitchcock*, 142 U. S. 547, goes as far as the second; though we need not say how far it has been affected by later decisions. *Mason v. United States*, 244 U. S. 262. All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that it no part of the crime of burglary. This, as we shall try to show, is as far as we need go here."

Counsel believe that these two cases are in direct conflict and that the conflict should be resolved by this Court.

The court below was of the opinion that petitioner was obliged to answer the questions propounded because the possible answers were not so intimately bound up with the essential elements of an income tax law offense that they could have endangered him. It said that answers to subsequent questions as to his receipts might have endangered

him (R. 138). It, in effect, thus decided that only those questions which establish an essential element of an offense are improper. On the contrary, the court in *Weisman* v. *U. S., supra,* concluded that the privilege is not confined to answers which directly admit one of the definite elements of an offense, but that it covers questions which imediately lead to any of them even though those questions will not elicit answers which are a part of the offense.

We submit that the law announced in *Weisman* v. *United States, supra,* is controlling:

> "There must be some reason to fear that the disclosure will put the witness in pressing danger. Indeed, perhaps in the end we should say no more than that the chase must not get too hot; or the scent, too fresh. In any event we are satisfied that if the privilege is to be of any value, a situation like that at bar must fall within it."

The case of *Arndstein* v. *McCarthy,* 254 U. S. 71, 65 L. Ed. 138, 142, is also in point. If Camarato had answered the questions propounded to him they would have inevitably led to a charge of income tax violations. The statement by the court that he could not be prosecuted if he was compelled to testify was of no avail. The immunity allowed must be coextensive with the Constitution. In the *Arndstein* case, *supra,* the court, speaking of an immunity statute (and there is none herein), quoted with approval *Counselman* v. *Hitchcock, supra:*

> "It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property."

The prosecution had the testimony of Fischer indicating the payment of $200.00 per week to Joseph Camarato for wire service. The prosecution had alleged in two indictments that Joseph Camarato's denial of accepting funds

from Fischer was perjury. The Government attempted to obtain from Samuel Camarato evidence which would connect him with the furnishing of wire service to horse rooms of Fischer fortified by the testimony Joseph Camarato, if non-perjuvious, and information gleaned from Samuel Camarato would indicate a violation of income tax laws, particularly where the prosecution alleged gambling in Atlantic City to be directed and controlled by Samuel Camarato, the witness herein, *and where it was conceded that the grand jury was investigating income tax frauds* (R. 49). It seems obvious that the disclosure of the information sought would, if the testimony developed, incriminate Samuel Camarato, or at least search out other testimony of income tax violation destructive of the immunity privilege of petitioner so concisely condemned in *Arndstein* v. *McCarthy, supra.*

Finally, it may be remarked that if petitioner properly refused to answer *any* of the questions propounded, the judgment below must be reversed inasmuch as the sentence of six months is indivisible and based upon the case as a whole (R. 88). The situation is similar to that passed upon by this Court in *Gompers* v. *Buck Stove,* 221 U. S. 418, 440. See also *Foot* v. *Buchanan,* 113 Fed. 156, 161, and *People* v. *Newmark,* 312 Ill. 625.

3. Conflict with decisions of this Court:

Petitioner submits that the court below did not give proper effect to the decisions of this Court in *Counselman* v. *Hitchcock,* 142 U. S. 550, 564, and *Mason* v. *United States,* 244 U. S. 362.

The lower court said (R. 136):

> "When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness."

However, this is but an isolated phrase from *Mason* v. *United States, supra* (364). This Court in that case also said (364):

> "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed. It is this: When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

and quoted from *Chief Justice Cockburn in Reg* v. *Boyes*, 1 Best and S. 311, 329, 330, 121 Eng. Rep. 730:

> "To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: * * * A question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering unless he is

satisfied that the answer will tend to place the witness in peril."

Considering the facts as hereinbefore set forth, viz:

(1) Camarato (petitioner) controlled the gambling enterprises in Atlantic City.

(2) Identical Grand Jury investigating income tax frauds.

(3) Disposition of income from horse rooms.

(4) Petitioner's statement that he had heard and read in the newspapers that the Grand Jury was investigating him.

(5) Indictment and conviction for income tax frauds in Atlantic City of other gamblers, we believe the record discloses that the language adopted by this Court in *Mason* v. *United States, supra,* is particularly persuasive of the propriety of immunity, *i. e.*:

> "To entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable grounds to apprehend danger to the witness from his being required to answer. We indeed quite agree that if the fact of the witness being in danger be once made to appear great latitude should be allowed in judging for himself of the effect of any particular question."

We think the danger to Camarato was real and substantial and not remote, and that *Mason* v. *United States, supra,* is authority for reversal herein.

The case of *People* v. *Conzo,* 301 Ill. App. 524, 23 N. E. (2d) 210, gives an excellent discussion on this very difficult subject. The court quotes with approval, *People* v. *Forbes,* 143 N. Y. 219, 38 N. E. 303, wherein it was said:

> "The witness who knows what the court does not know, and what he cannot disclose, without accusing himself, must in such cases judge for himself as to the effect of his answer and if to his mind, it may constitute a link in a chain of testimony, sufficient to convict him, when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment or trial, he may remain silent."

The court further said:

> "The burden was not on the witness to show how the answer might tend to incriminate her. To require that to be done would in many cases defeat the claim of protection. The law does not require a witness to explain in the first instance how her answer will incriminate him or tend to do so, because the explanation itself would or might deprive him of the protection. * * * A witness cannot arbitrarily decline to answer merely because he states that such testimony would tend to incriminate him. * * * *Great weight should be given to a witness in a doubtful case.*"

In the *Counselman* case, *supra,* there was an immunity statute. In the *Camarato* (instant) case there was not an immunity statute. Among the questions asked which Counselman declined to answer were, "Whether a particular railroad transported grain for any person for less than the established rates in force and if he knew any person who had obtained transportation of grain over the same railroad for less than the published rate." This Court held:

> "The relations of Counselman to the subject of the inquiry before the Grand Jury, as shown by the questions to him, in connection with the provisions of the Interstate Commerce Commission Act, entitled him to invoke the protection of the Constitution."

If in the *Counselman* case, notwithstanding an immunity statute, this Court held that a witness did not have to answer

questions apparently so innocuous, how much stronger is the position of Samuel Camarato in the instant case where the questions propounded definitely attempt to connect him with the wire service in Atlantic City, which furnished information to gamblers. It is conceded that income tax violations were under investigation at that time (R. 49).

This Court in the *Counselman* case, *supra,* also said at page 587:

> "Under the rulings above referred to by Chief Justice Marshall and by this Court and those in Massachusetts, New Hampshire and Virginia, the judgment of the circuit court in the present case cannot be sustained. It is a reasonable construction, we think, of the constitutional provision, that the witness be protected from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers in direct admission against him."

The Government contended in the trial court that the *Counselman* case has to all intents and purposes and, except for general principles, been overruled (R. 59). The cases which have been decided since that case and immunity statutes which have since been enacted clearly show that the decision of the *Counselman* case is sound law and is still adhered to. The *Counselman* case has been cited frequently with approval since the decision in *Mason* v. *United States, supra,* upon which the Government so strongly relied in the trial court. See *Sherwin* v. *United States,* 268 U. S. 369, 372; *McCarthy* v. *Arndstein,* 266 U. S. 34, 40; *Arndstein* v. *McCarthy,* 254 U. S. 71, 73.

It was reasonable for petitioner to assume that there was a substantial probability of peril if he answered the questions which were propounded. The court should have recog-

nized the immunity claimed. Its failure to do so was contrary to the decisions of this Court as hereinbefore stated.

An examination of the brief of the Government in the case below will disclose that it used this exact language:

> "There is also a difference of opinion as to just how far the Supreme Court intended to go in *Counselman* v. *Hitchcock, supra*" (Page 10 of Government's brief below).
>
> "Leaving the actual holding of *Counselman* v. *Hitchcock, supra,* and considering the language of the opinion, no definite guide for lower courts can be found" (Page 10 of Government's brief below).

A further expression of the state of doubt as to the correct rule to be followed is found in Section 4, "Self-Incrimination", *Selected Essays on Constitutional Law,* Vol. 2, pages 1398-1476 (published under the auspices of the Association of American Law Schools).

II.

The Mode of Prosecution Denied Due Process.

As found by the court below, petitioner appeared before the grand jury on September 12th in response to a subpoena and refused to answer certain questions. He was told to appear before a District Judge and upon his appearance with counsel was advised by an Assistant United States Attorney that a presentment would be filed against him and was told to appear on September 19th before the court (R. 134, 135). On September 13th the presentment (R. 2) was filed with the clerk of the court (R. 1) and a copy mailed to counsel. No process was issued by the court (R. 135). When the case was moved on September 19th the government conceded that it was proceeding on the aforementioned presentment (R. 5). Motion was made to dismiss the proceeding because it was not based upon a present-

ment of the grand jury, the presentment did not contain a prayer under which an order could be made, petitioner was not apprised of the nature of the charge against him and because no rule or other process had been issued by the court (R. 6). The motion was denied and exception taken (R. 9).

In determining that the procedings leading to the judgment of conviction were adquate and did not deny to petitioner procedural due process of law, the court below decided an important Federal question, viz., the practice and procedure to be pursued in prosecution of criminal contempt charges, in conflict with and in disregard of applicable decisions of this Court.

Since the alleged contempt was not committed under the eye of the court and accordingly the court could not act wholly upon its own knowledge, due process required that a rule or other process issue "to require the offender to appear and show cause why he should not be punished."

Cooke v. *United States,* 267 U. S. 517, 535, 69 L. Ed. 767, 773.

The government conceded in the District Court that a petition and order to show cause were necessary in a civil case but contended that they could be dispensed with in the case of a criminal contempt (R. 7). Since a criminal contempt proceeding is a criminal case (*Gompers* v. *United States,* 233 U. S. 604, 610, 58 L. Ed. (1115) 115, 120), it seems to counsel that it is more important that the requirements of due process be observed in that type of case than in the case of a civil contempt.

Inasmuch as criminal contempt proceedings are instituted to vindicate the authority of the court, of which the grand jury only serves as an arm, the court against which the contempt has been committed should in the first instance be

appropriately advised of the witness' misbehavior, which must adequately appear in the moving papers.

Sona et al. v. *Aluminum Castings Co.* (6th Cir.), 214 Fed. 936, 939.

This requirement is not formal but substantial, for it seems that the witness is entitled to the protection of the court and to be saved from unnecessary prosecution before process is issued against him.

The court below intimated in its opinion (R. 139, footnote) that no presentment or process was necessary because petitioner was before the grand jury under a subpoena which directed him to come before the court. It failed to follow the decision of this Court in the case of *Michaelson* v. *United States, ex rel. C. St. P., M. & O. R. Co.*, 266 U. S. 42, 64, 69 L. Ed. 162, 167, wherein it was held that a proceeding for criminal contempt "is between the public and the defendant, is an independent proceeding at law, and no part of the original cause". Being a separate proceeding arising out of a witness' behavior before a grand jury but in no other way related to that cause, process, other than the subpoena should have been issued by the court after a proper presentation to it.

The practice of presenting a preliminary complaint, particularizing the charge and procuring a show cause order has been pursued in many of the cases which have reached this Court for final determination. Some of such cases are

Sinclair v. *United States*, 279 U. S. 749, 73 L. Ed. 938;

Toledo Newspaper Co. v. *United States*, 247 U. S. 402, 62 L. Ed. 1186;

Blair v. *United States*, 250 U. S. 273, 63 Law Ed. 979.

Due process of law further requires that the alleged contemner should be advised of the charges against him and in

the case of a criminal contempt, that it is a charge and not a suit.

Cooke v. *United States, supra,* at p. 537, 517, 69 L. Ed. at 744.

He must be able to ascertain by a mere inspection of the papers whether the contempt proceedings are civil or criminal.

Gompers v. *Bucks' Stove and R. Co.,* 221 U. S. 418, 446, 55 L. Ed. 797, 808.

The petition or presentment, whether the proceedings be civil or criminal, must contain an allegation that the witness is guilty of contempt and a prayer that he be attached and punished therefor.

Gompers v. *Bucks' Stove and R. Co., supra,* at pages 441, 448.

The title of the case did not disclose its nature. While it is better practice to entitle a proceeding for criminal contempt as was done here, the title is only "a fact to be considered along with others" to determine the type of case presented.

Gompers v. *Bucks' Stove and R. Co.,* at p. 446;
In re Fox (3 Cir.), 96 F. (2d) 23.

The proceeding, although entitled "In Re Samuel Camarota," could readily have been civil in its nature. In *Luobriel* v. *United States* (2 Cir.), 9 F. (2d) 807, a witness was committed until such time as he might furnish the names of certain people as requested by a grand jury. Thus a proceeding instituted by the United States may well be coercive and remedial rather than punitive, and the title of the proceedings alone does not control or indicate the nature of the case.

It is obvious that the practice pursued in the instant case fell far short of the requirements of due process as determined by this Court in the foregoing cases and hence amounted to a denial of due process of law. The defect is not one of mere form of procedure but is substantial because petitioner did not know until the proceedings were under way and could not ascertain from the presentment that he was faced with a criminal charge upon which, if convicted, he could be imprisoned for a definite term, the duration of which could be fixed in the court's discretion.

This Court has recently held in *Chambers* v. *Florida,* 309 U. S. 227, 84 L. Ed. 419, that an accused is of right entitled to procedural due process and that the requirement of conforming to fundamental standards of procedure in criminal trials was made operative against the States by the Fourteenth Amendment. It was likewise made operative against the Federal government by the Fifth Amendment, which is applicable to contempt proceedings.

Cooke v. *United States, supra,* at p. 537.

This Court granted certiorari (281 U. S. 716, 74 L. Ed. 1136) to review the decision in the case of *O'Connell* v. *United States* (2 Cir.), 40 F. (2d) 201, wherein the question involved was whether O'Connell had been denied procedural due process, although, as appears from a report of that case, he "was fully advised of what the proceeding was" because the United States Attorney had read the testimony "and asked that the witness be punished", 40 F. (2d) 201, 202, 203. The writ was subsequently dismissed on stipulation, 75 L. Ed. 1472 (not officially reported, but appearing in the Journal of this Court for June 12, 1930). It appears to counsel that since the question involved in the instant case is substantially similar to the question which would have been reviewed had the writ not been dismissed in the *O'Connell* case by stipulation, that a writ should be granted

to review the decision of the court below in the instant case in order that courts hereafter may have a definite guide in disposing of criminal contempt cases which are so important in the administration of justice.

Conclusion.

It is respectfully submitted that the petition should be granted.

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